

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DONALD R. HULL	:	CIVIL ACTION
	:	
v.	:	
	:	
JEROME MALLON, WENTWORTH D.	:	
VEDDER, CHRISTOPHER DIVINY,	:	
Assistant Philadelphia District	:	
Attorney, and LYNN ABRAHAM,	:	
Philadelphia District Attorney	:	No. 00-5698

MEMORANDUM ORDER

Plaintiff initiated this action in the Philadelphia Common Pleas Court. He asserts that defendants engaged in professional malpractice and violated his 6th and 14th Amendment rights. The case was timely removed to this court by defendants Abraham, Diviny and Vedder, the only defendants to have been served.<sup>1</sup>

Presently before the court is the motion of defendants Abraham and Diviny to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Dismissal for failure to state a claim is appropriate when it clearly appears that the plaintiff can prove no set of facts to support the claim which would entitle him or her to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). Such a motion tests the legal sufficiency of a claim accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v.

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<sup>1</sup>Although plaintiff makes no reference to 42 U.S.C. § 1983, he does allege constitutional violations in a context sufficient to support original subject matter jurisdiction.

Clark, 835 F.2d 1009, 1011 (3d Cir. 1987)). A complaint may be dismissed when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988).<sup>2</sup>

The following appears from plaintiff's complaint and attachments. Plaintiff was charged with aggravated assault and involuntary deviate sexual intercourse arising from his brutal encounter on August 13, 1993 with Rhonda Taylor. She was choked, sodomized, beaten, left in Fairmount Park where she was found by police and admitted to a hospital in critical condition. Plaintiff pled guilty to these charges on November 18, 1993 and received two eight-to-twenty year concurrent sentences. Plaintiff's case was prosecuted by defendant Diviny in his capacity as an assistant District Attorney. Defendant Abraham was then, and is, the District Attorney of Philadelphia. Plaintiff was represented by defendant Mallon, a public defender.

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<sup>2</sup>While well pled factual allegations are accepted as true, a court need not credit bald conclusory assertions or legal conclusions. See Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997). A court may also consider public records and documents attached to the complaint, as well as documents of undisputed authenticity on which a claim is predicated that are appended to the motion. See Churchill v. Star Enter., 183 F.3d 184, 190 n.5 (3d Cir. 1999); Beverly Enter., Inc. v. Trump, 182 F.3d 183, 190 n.3 (3d Cir. 1999), cert. denied, 120 S. Ct. 795 (2000).

Plaintiff alleges that he "was forced into taking a negotiated guilty plea" when Mr. Mallon and the District Attorney's office conspired to withhold favorable evidence and to produce perjured witness statements. Plaintiff seeks compensatory and punitive damages, as well as a declaratory judgment that his constitutional rights were violated.<sup>3</sup>

Plaintiff's § 1983 claims clearly challenge the validity of his underlying conviction and resulting incarceration. As plaintiff has made no showing or suggestion that his conviction has been reversed on appeal, expunged by executive order, declared invalid by an authorized state tribunal or called into question by the grant of a federal writ of habeas corpus, these claims are barred. See Heck v. Humphrey, 512 U.S. 477, 486-87 (1994); Smith v. Holtz, 87 F.3d 108, 112 (3d Cir. 1996); Shelton v. Macy, 883 F. Supp. 1047, 1049 (E.D. Pa. 1995). See also Zolicoffer v. F.B.I., 884 F. Supp. 173, 175-76 (M.D. Pa. 1995). Heck applies to claims for compensatory or declaratory relief. See Edwards v. Balisok, 520 U.S. 641, 648 (1997) (Heck bars claim for damages and declaratory relief); Clarke v. Stalder, 154 F.3d 186, 189 (5th Cir. 1998) (claims for damages

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<sup>3</sup>Plaintiff specifically requests a declaratory judgment that defendants violated his rights under "Title 18 § 5701" and that plaintiff has a cause of action for removal of Ms. Abraham from office under "Title 18 § 5726." No such federal statutes exist. The corresponding sections of Pennsylvania statutes are part of the Wiretapping and Electronic Surveillance Control Act. Plaintiff may be referring to 18 Pa. C.S.A. § 5726 which provides for a private action when a public official violates the Act. There are, in any event, no facts alleged remotely implicating this Act.

and declaratory relief are not cognizable in § 1983 action unless conviction has been invalidated); White v. Gittens, 121 F.3d 803, 807 n.3 (1st Cir. 1997) (Heck applies to § 1983 suits for declaratory relief as well as for damages).

Moreover, prosecutors are absolutely immune for actions performed in a quasi-judicial role. See Imbler v. Pachtman, 424 U.S. 409, 431 (1976); Kulwicki v. Dawson, 969 F.2d 1454, 1463 (3d Cir. 1992). Withholding exculpatory evidence and producing false evidence are quasi-judicial acts protected by absolute prosecutorial immunity. See Dory v. Ryan, 25 F.3d 81, 83 (2d Cir. 1994) (producing false evidence); Reid v. State of New Hampshire, 56 F.3d 332, 336-37 (1st Cir. 1995) (knowingly withholding exculpatory evidence); Kulwicki, 969 F.2d at 1465, 1467 (knowing use of false testimony); Henzel v. Gerstein, 608 F.2d 654, 657 (5th Cir. 1979) (offering perjured testimony and suppressing exculpatory evidence). See also Taylor v. Kavanagh, 640 F.2d 450, 453 (2d Cir. 1981) (prosecutor's action in plea bargaining subject to absolute immunity); Lopa v. Kane, 1994 WL 165226, \*1 (E.D. Pa. Apr. 28, 1994) (assistant district attorney absolutely immune from § 1983 liability for coercing plaintiff to enter guilty plea). When the underlying activity is cloaked with prosecutorial immunity, a conspiracy claim is similarly precluded. See Pinaud v. County of Suffolk, 52 F.3d 1139, 1148-49 (2d Cir. 1995); Snelling v. Westhoff 972 F.2d 199, 200 (8th Cir. 1992); Cok v. Consentino, 876 F.2d 1, 3 (1st Cir. 1989); Ashelman v. Pope, 793 F.2d 517, 522-23 (5th Cir. 1985).

Insofar as plaintiff asserts a conspiracy claim against these defendants in their official capacities, such a claim may only be maintained against a policymaker. See Basile v. Elizabethtown Area Sch. Dist., 61 F. Supp. 2d 392, 405 (E.D. Pa. 1999); Kis v. County of Schuylkill, 866 F. Supp. 1462, 1479 (E.D. Pa. 1994). Plaintiff states that these defendants were executing or implementing an official policy. He does not, however, specify what this policy was. As an assistant District Attorney, defendant Diviny also was not a policymaker. See Jorden v. Appledorn, 2000 WL 1100786, \*3 (E.D. Pa. Aug. 1, 2000); Payson v. Ryan, 1992 WL 111341, \*10 (E.D. Pa. May 14, 1992), aff'd, 983 F.2d 1051 (3d. Cir. 1992).

Finally, insofar as plaintiff suggests that Ms. Abraham is liable for the conduct of those in the "chain" in her office, there is no respondeat superior liability under § 1983.<sup>4</sup>

**ACCORDINGLY**, this                      day of August, 2001, upon consideration of the Motion of defendant Abraham and Diviny to Dismiss (Doc. #10), and plaintiff's response, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and plaintiff's claims against these defendants are **DISMISSED**.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**

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<sup>4</sup>Insofar as plaintiff complains about defendants' actions in November 1993, his claims would also be subject to the bar of the two-year statute of limitations.